



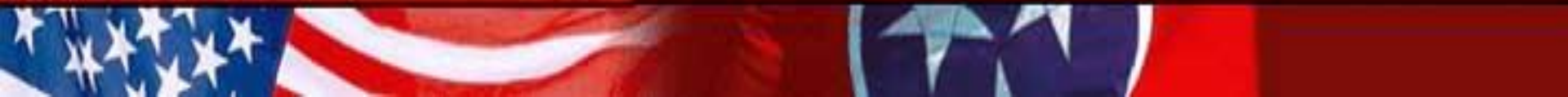
Tennessee's Rules of Evidence and Medical Issues in Workers' Compensation Cases

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Door Prize ! ! !

**2nd Fastest Responder with the
Correct Answer Wins**

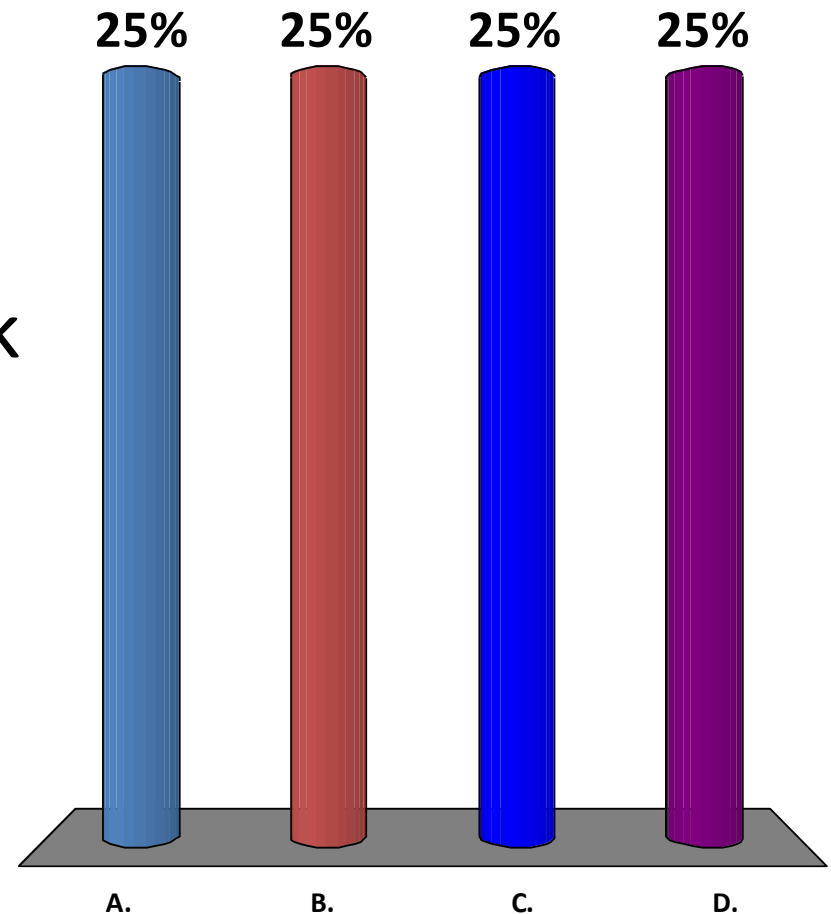
One Family Admission Pass
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Donated By:



How many days may an injured worker miss before they are entitled, by statute, to receive TTD benefits?


- A. One full workday
- B. One entire workweek
- ✓ C. Seven calendar days
- D. Whatever the company policy dictates





Fastest Responders

Seconds	Participant
2.372	14
3.398	6
3.438	2
3.576	11



Letting It All In

Medical Expert Evidence in Workers Compensation
Claims Under the 2013 Amendments

Professor Rebecca Haw, Vanderbilt Law School

Why experts? Causation



Except in the most obvious cases, medical causation must be proved by expert evidence.

See Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008); Orman v. Williams Sonoma, Inc., 803 S.W.2d 672, 676 (Tenn. 1991) .

Why experts?

Impairment

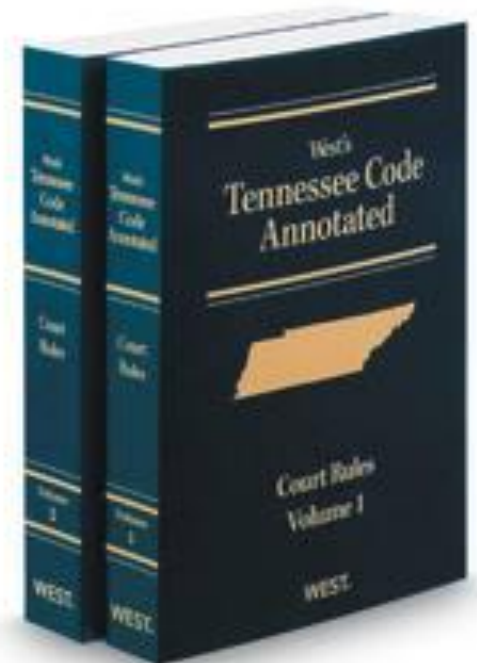


An impairment determination must be based on competent medical expertise.

See Tenn.Code Ann. 50-6-204(d)(3).

So, what's new?

Tennessee Rules of
Evidence now apply to
workers compensation
administrative proceedings



See 2013 Tennessee Senate Bill No. 200, Sec. 79(a)(3).

What do the rules say?

Rule 702

An expert opinion is admissible if it will substantially assist the trier of fact.

Rule 703

The facts the expert used to form his opinion must be *reliable*, but they are not necessarily *admissible*.

Rule 704

Unlike lay witnesses, experts can testify about the *ultimate issue*.

What do I need to know?

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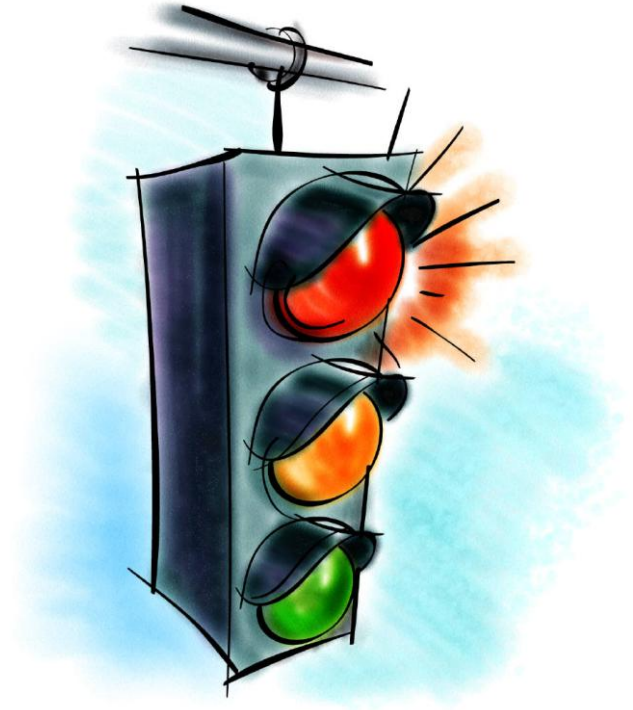
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Analytical Cohesion

Methodology (Daubert)

Foundational Reliability

Hearsay



Sufficiency

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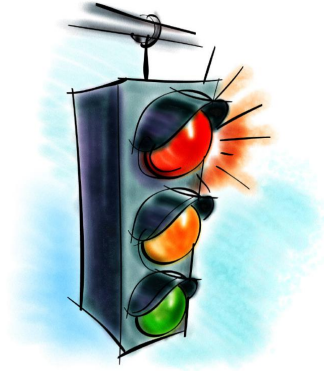
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What governs admissibility?

Tennessee Rule of Evidence 702

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

If not, then it's out.

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“We may not overturn the trial court’s ruling admitting or excluding expert testimony unless the trial court abused its discretion.” *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 274–75 (Tenn. 2005).

Who decides admissibility?



...and he gets tremendous deference on review.

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Why limit admissibility?

To prevent jury
confusion.

To protect the
jury's turf.

To avoid jury
prejudice.



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But there are no juries in comp!

That's why a judge is
likely to be liberal in
admitting medical
evidence, perhaps even
opinions she does not
credit.



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What is *Daubert*?

Daubert is a U.S. Supreme Court case establishing the admissibility of expert opinion in federal cases.

It has (basically) been adopted in Tennessee.



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“The court's reliability analysis has four general inter-related components: (1) qualifications assessment, (2) analytical cohesion, (3) methodological reliability, and (4) foundational reliability.” *State v. Scott*, 275 S.W.3d 395, 402 (Tenn. 2009).

What does Rule 702 *mean*?

It means the evidence must be *reliable*.



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When is an expert qualified?

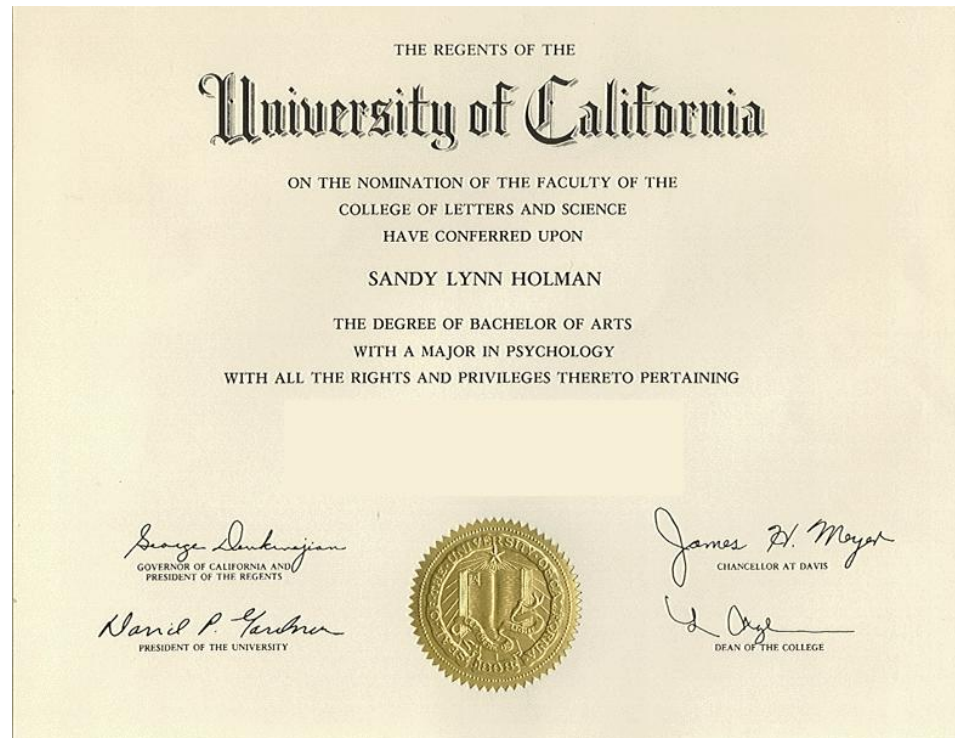
When she meets the professional standards set by her own specialty.

degree

**certification
or license**

**years of
experience**

awards



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How about physicians?

Probably any currently
practicing, licensed
doctor qualifies under
Rule 702.

A physician may qualify as an expert even if they are not licensed in Tennessee. *Hamilton v. American Tissue Inc.*, 2005 WL 182860 (Tenn. Workers' Comp. Panel 2005).

A physician probably need not be a specialist in the area in question. *Cf. State v. Duncan*, 698 S.W.2d 63, 68 (Tenn.1985).



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How about vocational experts?

Vocational experts (with related degrees and experience) have been qualified under Rule 702.

See *McCrary v. Cracker Barrel*, 2007 WL 1364662 (Tenn. Workers Comp. Panel)



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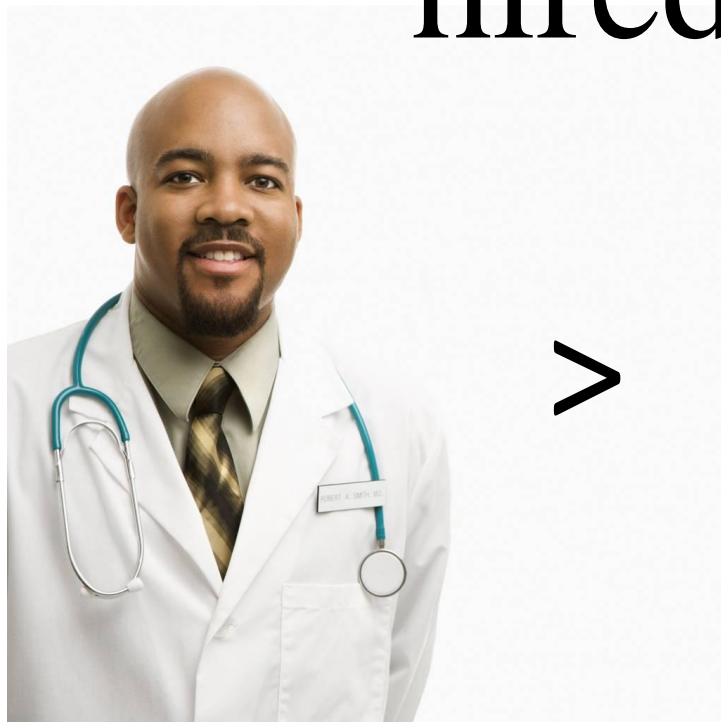
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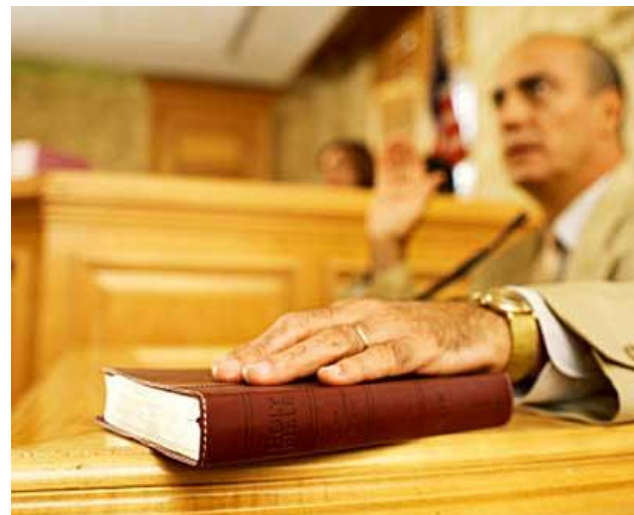
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How about hired guns?



>



A practicing clinician, active in his field, is more likely to be considered qualified than a professional witness with only theoretical knowledge.

See Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 273 (Tenn. 2009).

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Analytical cohesion?

There must be a close fit between the evidence cited by the expert and his conclusion.



See State v. Scott, 275 S.W.3d 395, 402--03 (Tenn. 2009).

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When is an expert's methodology sound?

McDaniel v. CSX Transportation, 955 S.W.2d 257 (Tenn. 1997).



1. When it has been **tested**
2. When it has been subjected to **peer review** or publication
3. When we know its **rate of error**
4. When it is **generally accepted** in the scientific community
5. When the expert's research has been conducted **independent of litigation**

First four are from *Daubert*, *McDaniel* adds the last factor.

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Wait, WHAT??

1. Causation and diagnosis are not **testable**
2. A physician's opinion about causation or diagnosis will almost never be **published**
3. We cannot know how often a physician's opinion is in **error**
4. **We can determine general acceptance in the field!**
5. An expert's opinion will often be formed for the **purpose of litigation**

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So does medical expertise fail?

The *McDaniel* factors need not
all be applied

...they only apply when they
are a reasonable way to
measure the reliability of an
expert's methodology

...and they are non-exhaustive.

No!

Freeman v. Blue Ridge Paper Prod., Inc., 229 S.W.3d 694, 703 (Tenn.Ct.App.2007).

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So what does matter?

General acceptance within the medical
(or vocational expert) community.



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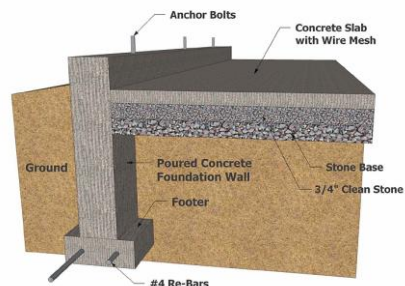
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What does Rule 703 mean?

Opinions founded on unreliable facts are not admissible.

The facts forming the basis of an opinion need not *themselves* be admissible.

But, even inadmissible foundational facts may be disclosed to jury if their probative value outweighs their prejudicial risk.



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When is an opinion well-founded?

When the underlying facts/data are the kind that are typically relied on in the field.



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What about self-reporting?

Patient interviews
and self-reported
symptoms are
accepted bases for
medical diagnosis.

See State v. Scott, 275 S.W.3d
395, 406--07 (Tenn. 2009).



But, (probably especially in comp) objective corroboration will be persuasive.

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Medical records and
other doctors'
opinions are
accepted bases for
medical diagnosis.

See N.J. Zinc Co. v. Cole, 532
S.W.2d 246, 250 (Tenn. 1975)

What about another doctor's notes?



But actually having seen the patient makes a physician's opinion more reliable.

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Are medical records hearsay?

hearsay

Technically yes, since they contain out-of-court statements,
but they are admissible under the “business records”
exception to the hearsay rule.

Tenn. R. Evid. 803(6)

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Are there other hearsay problems?

Anything not subject to a hearsay exception may still be admitted into evidence if

a) It is a the kind of statement an expert typically relies on in her field, and

b) The judge determines that its probative value exceeds its potential for prejudice.



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What is enough evidence?

Whatever this guy says
is enough.



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Can I bolster my expert evidence?



Yes, lay witnesses can corroborate medical expert opinion about causation and impairment.

Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 643 (Tenn. 2008)

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Can a lay person testify about the ultimate issue?

No, but he can testify about his objective observations.



“I saw him fall at work.”

v.



“The injury was caused by a fall at work.”

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Must my expert be 100% certain?

No, an expert may opine in probabilities, but he
may not merely speculate.

Absolute certainty in the medical
evidence is not required.

Fritts v. Safety Nat'l Cas. Corp., 163 S.W.3d 673, 678
(Tenn. 2005)

Merely stating that causation is “possible”
(without more) is not enough.

Miller v. Choo Choo Partners, L.P., 73 S.W.3d 897, 902
(Tenn. Ct. App. 2001)



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Which physician will get deference?

Ostensibly, the “authorized treating physician.”
Russell v. Genesco, Inc., 651 S.W.2d 206 (Tenn. 1983).

But see *Grier v. Alstom Power, Inc.*,
2013 WL 1460520 (Tenn. 2013):

“[It] was within the discretion of the
trial judge to determine which expert
testimony to accept.”



Whoever this guy
believes.

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How will my practice change?

You will need to talk the talk of the rules of evidence.

But in practice, the kind of evidence you are
allowed to present will probably be the same.

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Why won't comp evidence change?

1. There is essentially no hearsay problem.



2. The Daubert/McDaniel factors don't really apply to medical testimony.

3. The judge, not a jury, is the trier of fact.



Of these three, this is the most important reason why the amendments will not revolutionize workers comp evidence.



No juries.



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